LOS ANGELES BAR BULLETIN

In This Issue

VOL. 21 SEPTEMBER, 1945 NO. 1

LOS ANGELES

BAR BULLETIN

Official Monthly Publication of Los Angeles Bar Association. Entered as second-class matter October 15, 1943, at the Postoffice at Los Angeles, California, under Act of March 3, 1879. Subscription Price $1.00 a Year; 10c a Copy

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THE PROPRIETIES

A recent issue of *"Life"* Magazine revealed the following evidences of one lawyer's concept of the practice of law:

1). Disclosure of his clients' personal affairs.

2). Bold admission of his participating in a "divorce mill" in Los Angeles.

3). Photographs of clients in his office and in the court room with complete data of confidential nature as to the causes of divorce and the results achieved.

4). Disclosure of the fees that he charged.

5). Informing all and sundry as to one or two tricks employed by him in the gaining of a divorce decree, *e.g.*, securing witnesses to call a dowdy a "glamour girl" on the subject of her husband's complaint that she partook of breakfast without dressing.

6). Boast of the speed with which he was able to secure divorce decrees.

7). A "tip" as to how his previous newspaper experience enabled him to secure favorable publicity and "leg art" so as to ensure future business.

8). Reference to himself as "Sammy".

9). His personal antecedents recited including qualifications for securing the business.

Here is as bold a challenge to the American Bar's sense of ethics and proprieties as has ever been hurled by one temperamentally and culturally unequipped to carry on the noble traditions of an honorable profession. Dignity, privacy and honor have been veritably smashed. If there are critics who point to the said decadence of the Bar, the time is ripe for the Los Angeles members of the Profession to act swiftly and surely in punishment that should be so emphatic and stringent as to make utterly impossible a repetition of so flagrant a violation of our ethics ever again.

A. WARREN LITTMAN.

The above is reprinted from the New Jersey Law Journal of August 9, 1945.

RESOLUTION ADOPTED BY THE BOARD OF TRUSTEES ON AUGUST 17, 1945, RESPECTING

HONORABLE RALPH E. JENNEY

On motion duly made and seconded, the following resolution was unanimously adopted:

IN MEMORY OF HONORABLE RALPH E. JENNEY.

Nature, in constant quest for progress toward perfection, brings into being new and improved life. Of such was Honorable Ralph E. Jenney who, blessed with gifts and talents, strove successfully to refine them into the highest expression. He repaid the bounty of Providence by giving of his gifts and of himself to all who came within his sphere. As a youth he made the most of his opportunities to develop himself; as a man he made the most of his opportunities to bring like development to others.

Graduating from the University of Michigan, he entered the profession of his choice, practicing law in the East and in the

Northwest before coming to San Diego to make his home. There his industry, integrity, ability, sincerity and affability carried him to the peak of wide professional recognition. Participating in many worthy civic undertakings he served with distinction his community, his state and his country as Chairman of the California State Relief Commission, President of California Council on Social Work, member of the Executive Committee of Los Angeles Council of Social Agencies, First Vice-president of the Los Angeles Area War Chest, President of Los Angeles Community Welfare Federation and in various other executive capacities.

As a Federal Judge he earned the respect and admiration of all and in addition enjoyed a mutual fellowship with countless professional, church and lay friends, who held him in high regard as a man, a lawyer, a jurist, a philanthropist and as a gentleman.

Kindly, thoughtful, understanding, tolerant and generous, he gave of his abundant self as if his treasure were inexhaustible, as indeed it was. Beloved as he was, his love for others was even greater.

So high was his resolve, so exacting his self-discipline, so genuine his personality, so full his life, he enriched everyone and everything touched, and exemplified the very spirit of true friendship.

The Los Angeles Bar Association is as proud as it is bereaved to pay this tribute to him and to clothe with the everlasting mantle of greatness the virile and verdant memory of Ralph E. Jenney.

GURNEY E. NEWLIN, *Chairman*
ELMO H. CONLEY
ALEXANDER MACDONALD
Resolutions Committee of the Los Angeles Bar Association.

BY THE BOARD

Reestablishment: Chairman Herbert Freston of the State Bar committee on reestablishment of lawyers after return from military service, explained to the Board of Trustees the work of the State Bar to assist veterans. He informed the Board that the state body was prepared to establish a placement bureau in Los Angeles and that questionnaires would be sent to all lawyer veterans and all civilian members of the State Bar for the guidance of the Committee; also that refresher courses will be made available to veteran

lawyers. No formal action was taken by the Board except to request the Association's committee to cooperate in the program of the State Bar.

* * *

Federal Bar: President Macdonald presented to the Board a communication signed by Hon. Thomas F. McAllister, Judge of the U. S. Court of Appeals for the Sixth Circuit. Judge McAllister's communication stated that he had been appointed Chairman of a Committee to consider the advisability of regulating admission to the bar of the federal courts by uniform rules, and that he would appreciate counsel and suggestions from the Los Angeles Bar Association. The Board voted that the President appoint a committee to consider the matter and report for further consideration. President Macdonald appointed Vincent Morgan a committee of one. Subsequently, Mr. Morgan recommended that the Association wait until the Committee of Judges formulates its proposed rules. This was approved by the Board.

* * *

Richard J. Dillon: Resolution adopted by the Board of Trustees of the Los Angeles Bar Association:

> "WHEREAS, it has pleased Almighty God to call to his eternal reward Richard J. Dillon, a graduate of Hastings College of Law, Class of 1896, and admitted to practice in California in the same year, and a long-time member and past president of this Association, who throughout a long and successful practice of his profession in this community united a sound knowledge of the law and good business judgment with a true spirit of charity, equally ready to assist the poor or the rich provided only the cause were just, and always ready to extend advice and help to the younger members of his profession;
>
> "NOW THEREFORE, BE IT RESOLVED, that, recognizing his splendid character and fine attainments in his chosen profession, this Association sincerely deplores his death and extends to all the members of his family its most profound sympathy in their great loss;

"RESOLVED FURTHER that this resolution be spread upon the minutes of the Association and a copy thereof be sent to Mr. Dillon's family.

Committee on Resolutions,
G. C. O'CONNELL, *Chairman*
FRANK G. FINLAYSON
PAUL VALLEE"

—E.D.M.

RANDOM COMMENT

High Commendation: Lieutenant Commander Stanley N. Gleis, United States Naval Reserve, well known among the younger members of the Los Angeles Bar Association, has received the commendation of Admiral E. J. King, Fleet Admiral, U.S.N. The citation reads:

"For outstanding performance of duty as Commanding Officer of the U.S.S. Wyffels during an enemy aerial attack off the Algerian Coast on May 11, 1944. When a large force of hostile planes swept in over the convoy and launched a vigorous attack, Lieutenant Commander (then Lieutenant) Gleis skillfully maneuvered his vessel for maximum evasive tactics and, laying down an effective smoke screen, succeeded in repelling the enemy assault. By the determined and accurate antiaircraft fire delivered by his ship, he contributed materially to the destruction of at least eleven hostile planes without damage to the valuable units of the convoy or the escorting vessels. Lieutenant Commander Gleis's forceful leadership and expert navigational skill were in keeping with the highest traditions of the United States Naval Service.

"A copy of this citation has been made a part of Lieutenant Commander Gleis's official record and he is hereby authorized to wear the commendation ribbon."

* * *

Award to "Larry" Beilenson: Lieut.-Col. Lawrence W. Beilenson, well known Los Angeles lawyer, has been awarded the Silver Star Medal by Brig. Gen. Kutschko, commander of a field headquarters of the Chinese Combat Command. The award, according to the citation, was "for gallantry in action at Chefang, Yunnan, China, November 27, 1944. Disregarding his own safety and refusing the offer of his Chinese

division commander to take the Americans to a place of safety on the occasion of a determined enemy attack on the division command post, Lt. Col. Beilenson, while under heavy fire, posted four officers and two enlisted men of his liaison team on an unprotected flank and he then moved from one position to another while under constant enemy small arms fire. The Chinese and Americans in the command post, though outnumbered, repulsed three successive Japanese attacks before the enemy was forced to withdraw. The courage and devotion above and beyond the call of duty displayed by Lt.-Col. Beilenson reflects great credit upon himself and the Armed Forces of the United States."

Col. Beilenson's wife and mother reside in Hollywood. He also served in World War I. He has long been prominent in legal circles in Los Angeles and Hollywood, being counsel for the Screen Actors Guild and the American Federation of Radio Artists.

* * *

Judicial Salaries: The Hobbs bill (H. R. 2181) to increase the salaries of federal judges, which is likely to pass when Congress reconvenes this fall, will make the following changes: Chief Justice Supreme Court, $20,500 to $25,500; Associate Justices of the Supreme Court, $20,000 to $25,000; Judges of Circuit Courts, the Court of Appeals for District of Columbia, the Court of Customs and Patent Appeals, and the Court of Claims, from $12,500 to $17,500; Chief Justice of the District Court for the District of Columbia, from $10,500 to $15,500; all other district judges, from $10,000 to $15,000. —E.D.M.

MILITARY JUSTICE

The War Department, through Undersecretary Patterson, has issued a statement on courts-martial, showing how the courts function, how many soldiers convicted by courts-martial are in confinement, and steps the Army takes to restore soldiers to duty.

It is a mathematical certainty, says the statement, that from any group of 8 million young men in civilian life, a certain number will commit crimes ranging from misdemeanors to rape

and murder. In an army during wartime, these men are exposed to stresses and hazards not encountered in civilian peacetime existence.

Therefore, it is not surprising that last year in the United States about 18,000 soldiers were convicted by general courts-martial or that 33,519 soldiers are now in confinement here and overseas under sentence of general courts-martial. This, says the statement, represents the total number from the 10 million men who have joined the army since the Selective Service Act was passed in 1940. It also includes a few still serving under sentences prior to 1940.

General Eisenhower recently reported on the record of troops who have served in the European theatre of operations from January, 1942, until June 1, 1945, the statement continues. In this period 4,182,261 American troops served in his theatre. Of this number only 10,289—less than one in 400—were sentenced to confinement by general courts-martial. Gen. Eisenhower says, in reporting these figures, that the administration of military justice "receives my constant personal care; particularly in the serious cases in which I am called upon for personal review, I give a tremendous amount of time and thought."

Discussing death sentences, the statement says: "In most states, extreme crimes of murder or rape are punishable by death. Before the war, about 150 men a year, convicted in civilian courts for rape or murder, were executed in this country. Like civilian courts, military courts may direct the death sentence for extreme crimes. During the entire length of this war, the Army has executed 102 of its soldiers. All executions but one were for murder or rape. One was for desertion, the first execution for a purely military crime since the Civil War. This man, serving in the European theatre, deserted twice under fire."

No American soldier can be executed, the statement says, until his case has been reviewed and the sentence approved by the President, if the soldier is in the United States, or by the theatre commander, if the offense is committed overseas.

The great diversity of conditions facing our troops is reflected by the wide variety of offenses committed. A soldier gets drunk in North Africa and shoots an Arab. Another steals from the Red Cross while on furlough in London. Another

violates a girl in Italy. Another holds up a lunch counter in Denver. A lieutenant overstays his leave for a month, leaving a trail of bad checks. A sergeant shoots a companion in a crap game in New Caledonia. A soldier runs away from his outfit in the front lines at Salerno. Another gives himself up at Ft. Devens, Massachusetts after being a.w.o.l. for eight months. Several steal army supplies and sell them in the black market in Paris. These are examples recited by the detailed statement on military justice.

Whatever the offense, whether it is a crime that would be punishable under civil law or a crime against military discipline, the soldier is subject to trial by court-martial, which merely means a military court operating under rules set by Congress. It operates according to the highest standards of justice. Its proceedings are open to any interested observer, subject to necessary wartime restrictions on the movement of persons in areas under army control. Officers who sit at the court are under sworn obligations to assure a fair trial and to safeguard fully the rights of the accused.

In order to demonstrate the fairness of the system of military justice, the statement takes the case of the soldier who was a.w.o.l. for eight months, and follows it through: the investigation, the trial, the review of the record, the sentence, and the approval or reduction of the sentence; and, after six months in disciplinary barracks, another review for clemency consideration.

The system is a fair one, it is asserted, both to the accused and to the Army. Everything is done that is humanly possible to assure justice to the individual and enforcement of discipline necessary to an army.

Policies on the custody and correction of military prisoners and the administration of institutions of confinement are supervised by the correction division of the Adjutant General's office. The type of institution to which a convicted soldier is sent depends primarily on the seriousness of the offense. Minor offenses, 6 months or less, are placed in post guardhouses, corresponding to a city or county jail. General prisoners can be put in any one of three types of institutions: rehabilitation centers, disciplinary barracks, federal penitentiaries or reformatories.

About 60 per cent of those convicted by general courts-martial had committed military offenses. The remaining 40 per

cent committed crimes punishable under civil law. The objective of the rehabilitation centers is to restore men to military duty in the quickets possible time, hence military training receives the major emphasis of the program. Those who make good will receive an honorable discharge. Since the establishment of rehabilitation centers in December, 1942, to June 1, 1945, 23,674 men have passed through these institutions. More than half of this number have again become soldiers.

The Army has been confronted with the unprecedented task of administering military justice throughout the world to the ten million men who have joined it in World War II.

—E.D.M.

SELECTION OF JURORS

By James H. Pope, Judge of the Municipal Court

RIGHT to trial by jury is a check on trials by judges, and when juries consist of capable people of good intentions they give a measure of safety.

There is nothing about the office of juror which lifts a juror above his or her natural level. Proper selection of jurors is important to preserve the trial by jury as an institution, and to give a good measure of justice in individual cases.

There are many problems encountered in selecting juries, but the principal one to which I have had my attention attracted in recent months is the problem of obtaining a jury, the members of which will follow the law as given by the court.

The principal pitfall encountered is a false sense of justice. In seeking to do right, they will permit that thing that sometimes is called sympathy to override the instructions given them and return a verdict which does not satisfy the ends of justice. From the human standpoint it is pleasant to be generous with a sufferer when it doesn't come out of the givers' pockets.

The selection of a proper jury is a particular transaction with each individual juror. It is distinctly not a collective transaction.

I believe it would be of great value in the selection of juries if a record were kept of all the questions asked of each juror and all the answers given, and that the questions and answers be recorded in some convenient way so that counsel, as well as the court, in succeeding cases might examine the records and

begin the interrogation of the members of a panel with an ever broadening background of each juror. Inasmuch as it appears in Los Angeles to be the practice of jurors to seek service for successive terms when eligible, it would furnish a permanent record of value.

As a start in that direction there is being used in the writer's division of the Municipal Court a brief questionnaire, which contains the answers to the most common questions that are asked of jurors. I believe much time is saved by disclosing to counsel at the outset the answers of the jurors to the common questions.

I believe that it is of value to inform the members of the panel at the outset that the oath which they have taken to answer truthfully all questions asked of them about their qualifications is not a mere formality, but is a very solemn obligation, and that a breach of that obligation constitutes perjury. This admonition may be softened, if discretion indicates it, by the remark that the Court does not know of any jurors who have been prosecuted for perjury, but the Court has, unfortunately, in the past discovered instances where the Court believed such a prosecution was warranted. In the case at bar the Court will rely upon the answers, and will expect truthful answers.

My experience has been to the effect that to ask a juror the question, "Will you follow the law as given you by the Court?" and be satisfied with the juror's answer is of very little value. It may be satisfactory with the well intentioned jurors, but is without merit with the other class, and a determination of whether the juror will follow the instruction can only be made by decisive tests.

I have recently asked the questions which will follow, and I have had the experiences substantially as will be set forth. I will speak only of cases arising in negligence.

"Members of the Jury, it is the duty of the Court to select the jury to try this case and, like yourselves, I do not know the facts. I have before me the papers in the case, and I have read what the parties have alleged. But the law places upon me the duty of the selection of a jury, so I shall resort to surmise and imagination to cover possible contingencies. None of the questions that I will ask must be taken as an intimation of what the actual facts are, and are only useful in determining your qualifications.

Q1. Assuming, Members of the Jury, that you are instructed that the evidence you receive here in the courtroom determines your conclusions of fact, and that you are instructed by the Court as to the law, will you apply the law to the facts and reach a verdict accordingly, whether you agree with the Court in his statement of the law or not?

A. Yes (unanimously).

Q2. Let us assume that, in the course of the trial, appearances of people and the general atmosphere of the case convince you that there is a great disparity in financial position between the parties, and that one of the parties appears to you to be in need of money, while the other is in very comfortable circumstances, but under the facts, as you find them, the person who is in comfortable circumstances, and who may be the defendant, was not responsible for the accident, would you find in accordance for the defendant?

A. On an average, about ten out of twelve answer affirmatively. Two reply, 'I will follow the law and the evidence.' Pressed for a direct answer, they will usually, after hesitation, answer affirmatively.

Q3. Let us assume another case. Let us say that the plaintiff

in the action is a working girl, and was driving one of the common light cars, which she had purchased as a used car. The owner and operator of the other car is a middle-aged man of means, and he was driving one of the large, high-priced cars. Assume that you are instructed that if you find that the man is guilty of negligence and is responsible for the accident, and if you also find that the young working girl is also a little responsible for the accident, and that if she is guilty of negligence, even though slight, but that her slight negligence enters into the accident and is one of the causes of it, she cannot recover, but you have observed the difference in financial position, would you return a verdict for the defendant?

A. Approximate average, eight, yes; four, no.

Q4. Let us assume the same facts as I have set forth in my preceding question, but let me add to it now that the young working girl was injured in the accident and she had some doctor bills and she also suffered considerable pain, and the man was not hurt at all. But, as stated before, she was partly responsible for the accident, she was guilty of slight negligence, and under the law, as the Court may instruct you, if the plaintiff is guilty, even though slightly, and this slight negligence on her part is one of the proximate causes of the accident, she cannot recover, would you render a verdict for the defendant?

A. Approximate average, five, no; seven, yes.

Q5. Members of the jury, assume for the purpose of the question that there is an automobile accident and the plaintiff in the case is injured and suffers a great deal of pain, and the defendant is not injured and does not suffer any pain, and they are both at fault for the accident, but the fault is quite different in the degree of fault. The plaintiff is not as much at fault as the defendant. Assume the Court in-

structs you that if they are both at fault, neither can recover from the other, even though one is much more at fault than the other. Would you find a verdict for the defendant who is more at fault and didn't suffer any pain and injury?

A. Average answer, approximately six noes.

Q6. Let us assume in the case that the plaintiff is an individual of limited means, and the defendant is a corporation. Would that make any difference to you in following the law as the Court gives it to you?

A. No (unanimously).

Q7. Let us say the plaintiff in the action is an individual of limited means and suffered some pain and injury, and the defendant is a corporation, and so far as the evidence shows, a very large corporation and possessed of vast resources, and the plaintiff is partly at fault. If the Court instructs you that proof that the plaintiff was also at fault bars the plaintiff from a verdict, but you have observed that the defendant is a corporation of vast resources and the plaintiff is just an individual trying to get along, would you render a verdict for the defendant?

A. Approximate average answer, three noes.

Q8. Asking the same question as before, but identifying the corporation, the answers will vary with the identity according to the nature of the business of the corporation."

I think that it would be a proper thing to say that there is a tendency to equalize—to assist the needy and assess the well-to-do—that the doctrine of comparative negligence prevails as a matter of fact in many minds, that the doctrine of slight contributory negligence is an unpopular doctrine, and that in accident cases in which there is a disparity of financial position between the parties, the affluent is required to assist the needy, without a very particular regard to the facts, and the injured receive "special consideration."

The only thing the trial judges want to do is to see a fair consideration of fact and an application of the law as experience has made it, so that there will be a fair measure of justice.

One or two other facts, I believe, have considerable evidence to support them. One is that prejudicial questions do have an effect, and cure by admonition is an uncertain, if not a very doubtful thing.

One of the most effective prejudicial questions is, in cross-examination, to ask, if the party is a man, "Wasn't there a

woman in the car with you, who got out immediately after the accident and hurried away?" or, if the party is a woman, "Was there a man with you, who disappeared shortly after the accident?"

I believe it is dangerous to discuss the prejudicial question before the jury, because the argument will be advanced, "Some information to that effect came to my ears and, of course, if it be true, that person ought to be here as a witness," and, I fear, the more discussion of it, the worse the injury becomes.

I believe that a valuable check would exist upon the work of juries if the members knew that motions for new trial can be made, and that their verdicts are not in all cases final. That information, that there is such a thing as an order granting motion for new trial, comes somewhat as a surprise to some, and appears to have some effect as a check, and it may be that this might be used as a check upon the freedom of some persons to reach conclusions not consistent with the evidence and the law.

THE RENEGOTIATION OF WAR CONTRACTS

By George Bouchard, of the Los Angeles Bar

THE Renegotiation Act of 1942 was an innovation in the method of controlling war profits. In order that the philosophy of the statute may be understood and appreciated, it is necessary to refer briefly to the history of legislation designed to control war profits and the reasons which led to the adoption of the present act.

Historical Background

The first law limiting war profits was passed during the Spanish-American War when Congress limited the price on armor plate. In the First World War, Congress attempted to limit the making of excessive profits by cost plus contracts and imposing high excess profits taxes, but neither of these measures prevented such profits and the enormous profits realized by some war contractors became a public scandal. In the years following, measures for taking the profit out of war were extensively considered, as evidenced by the fact that between 1919 and April 28, 1942, 170 bills and resolutions were introduced in Congress designed to limit the profit on war production. In 1924, both major political parties declared in their platforms opposition to enrichment from war production.

Until after Pearl Harbor, the only laws passed which actually limited the profits on national defense contracts were the Vinson-Trammell Act of 1934, which limited the profit on Naval construction contracts for vessels and aircraft to 10% of the contract price, and the Merchant Marine Act of 1936, which provided for a 10% profit on ship contracts with the Maritime Commission. In 1939, this Act was amended to provide that the 10% profit limitation be applied only to contracts for Naval vessels and that on contracts for Army and Navy aircraft a maximum profit of 12% of the contract price be allowed. These laws all related to peacetime procurement, as we were not then preparing for war.

In June of 1940, after the fall of France, an act was passed changing the allowable profit on Naval vessels and Army and Navy aircraft to 8% of the contract price. This is the beginning

of the war profit limitation. While there was general agreement for the need to prevent excessive profits, the conditions of war production made it difficult to accomplish. War materials were required in enormous quantities with the greatest possible speed. In order to avoid delay, the procurement officers of the government had to make contracts without knowing what the costs would be or what a fair price would be. Contractors were asked to convert their plants for peacetime production to wartime production and many were asked to produce articles which they had never made, and accordingly had no cost experience to determine fair prices. The specifications of articles, quantities needed and rates of delivery changed with the demands of war and neither contractors nor procurement officers could make any accurate forecast of costs upon which to base prices. In the early stages of production, costs were certain to be high, but after production got under way, greater efficiency and increased volume could be expected to reduce costs.

On March 27, 1942, the President, by executive order, designated the War Production Board, the Army, Navy, Treasury,

Reconstruction Finance Corporation and Maritime Commission as the government agencies to inspect the plants and books of war contractors, to prevent the accumulation of unreasonable profits. These agencies established Price Adjustment Boards to assist them in securing voluntary refunds or adjustments, whenever the profits were thought excessive.

In the early part of 1942, several Congressional committees commenced investigation of reports that excessive profits were being realized, and while these investigations were pending the House of Representatives passed the Case Amendment, which provided that a contractor should repay all profits on war contracts in excess of 6% on sales before taxes.

The War and Navy Departments opposed a flat per cent of profit because it, in effect, placed all contracts on a cost plus basis and because they felt that the rate of profit should be related to the contribution of the contractor to the war effort. A flat per cent of profit on gross sales did not result in uniformity of treatment and was unfair as applied to different types of business engaged in war work. It did not recognize that the same volume of sales may require different amounts of capital, skill, and work; that some contractors were financed by the government while others used their own facilities and capital. A new contractor, probably government financed, and with high costs because of lack of experience, would reap a higher profit for the manufacturing of an article than a contractor who had been in the business many years and whose costs were low because of it. That was unfair on its face. Renegotiation was the only method suggested which was flexible enough to cope with the diversity between industries. At the suggestion of the departments, the Case Amendment was eliminated and the Renegotiation Act was passed. It is based upon the theory that the contract prices of each contractor could be adjusted after experience in the performance of the contract.

Application of the Act

The act, which became effective April 28, 1942, applied to all contracts and subcontracts, with certain exceptions, made with the departments named in the statute. The Revenue Act of 1942, passed in October of that year, adopted certain amendments which, for the most part, gave statutory approval to the pro-

cedure developed by the departments in the administration of the act. These amendments authorized renegotiation on an overall basis; recognized tax deductions and exclusions; allowed a credit for federal taxes paid on excessive profits; limited the time for commencing renegotiation; and authorized the making of agreements with a contractor determining the amount of excessive profits, which agreement could not be reopened except for fraud, malfeasance or willful misstatement of facts. On July 1, 1943, the Act was amended by making its provisions applicable to the Reconstruction Finance Corporation subsidiaries, Defense Plant Corporation, Metal Reserve Company, Defense Supplies Corporation and Rubber Reserve Company. On July 14, 1943, it was further amended to make its provisions applicable to agreements for the payment of a commission or other compensation for procuring war contracts.

As a result of complaints as to both the law and its administration, several committees of Congress—during 1943—held public hearings and took a vast amount of testimony. As a result of these investigations, each Congressional committee came to the conclusion that the Renegotiation Act was a desirable piece of legislation and should be continued. The Act has now been continued to December 31, 1945, unless the President declares hostilities terminated prior to the date.

The Committee on Ways and Means of the House of Represenatives recommended several drastic changes in the act. However, the bill as finally passed represented a decided victory for the Price Adjustment Boards, as Congress accepted changes favored by them, and rejected those which it opposed. Congress put its stamp of approval upon the past administration of the act by the boards, by giving existing policies a statutory basis; war contractors, on the other hand, were protected against the possibility of arbitrary treatment by the express provision for court review.

The 1942 renegotiation law applies to all fiscal years ending before July 1, 1943; the 1943 renegotiation law, which was passed as part of the Revenue Act of 1943 on February 25, 1944, applies to all fiscal years ending after June 30, 1943. The 1943 law follows the pattern of the 1942 law, but differs from it in the following principal respects:

(1) Under the 1942 law the renegotiation power was vested

in the Secretaries of the Departments, while under the 1943 law this power is vested in a Board consisting of one member from each Department, known as the War Contracts Price Adjustment Board.

(2) The 1942 law contains no reference to court action in renegotiation cases, whereas the 1943 law specifically provides in the case of a unilateral determination, for an appeal to the Tax Court of the United States.

(3) Under the 1942 law, renegotiation and repricing were covered by the same provision, whereas in the 1943 law they are separated. The repricing power is given to the secretary of a department and is set out in a separate title of the act.

(4) The exemption based on sales volume is $100,000 under the 1942 law, and $500,000 in the 1943 law. However, the War Contracts Price Adjustment Board has interpreted this provision to mean that no determination of excessive profits can be made in an amount greater than that which when deducted from gross sales will reduce them below $500,000. The $100,000 exemption does not work this way. It protects only those contractors whose gross government business does not exceed that amount. The contractor whose gross government business for any fiscal year ending on or before June 30, 1943, exceeds $100,000 is renegotiated as though there were no such exemptions.

The important provisions of the new law are as follows:

(1) The War Shipping Administration is now added to the group of departments whose contracts are subject to the act. The amendment adding the War Shipping Administration contractors is not retroactive as were Reconstruction Finance Corporation subsidiaries and broker contracts.

(2) Contract brokers whose commissions aggregate $25,000 for the fiscal year continue to be subject to renegotiation. Such brokers include agents who solicit prime or sub-contracts on a contingent basis.

(3) There was considerable agitation in Congress to modify the definition of subcontract as contained in the 1942 law, by limiting its application to articles which became component parts of the finished product. This would have eliminated from renegotiation, for example, machine tool dealers. However, in the

final bill the definition of subcontract remains the same as it was in the 1942 law. That definition reads as follows:

> "A subcontract is any purchase order or agreement to perform all or any part of the work or to make or furnish any article required for the performance of any other contract or subcontract, but subcontracts for the furnishing of office supplies are excluded. Subcontracts for the procurement of war contracts or for the payment of contingent fees therefor are renegotiable, but subcontracts of a company with its bona fide officers or full-time employees are not renegotiable as these contracts can be included in the company renegotiation."

Definition and Determination of Excessive Profits

One of the principal criticisms of the 1942 law was that it contained no standards by which excessive profits should be determined and it was claimed that Congress had made an unauthorized delegation of legislative power to administrative agencies. These agencies had, however, set up standards and policies by which excessive profits would be determined. The new law has attempted to cure this defect by providing that excessive profits are the profits from contracts with any of the departments named in the statute, which are determined by the War Contracts Price Adjustment Board to be excessive on the basis of the following factors:

(1) Efficiency of the contractor.

(2) Reasonableness of costs and profits in relation to amount of production.

(3) Average pre-war earnings and a comparison of war and peacetime products.

(4) Net worth and the amount and source of the capital employed.

(5) The risk assumed.

(6) Nature and extent of contractor's contributions to the war effort.

(7) Character of the business and such other factors as the public interest and fair dealing require.

These factors, however, are merely elements to be evaluated in the performance of a war contract. They should influence the granting of a larger or smaller profit allowance. They do not, however, dictate what the profit allowance shall be, and since

no rules are prescribed for determining profits, the Price Adjustment Boards must use their best judgment.

Congress, however, did decide that in determining excessive profits no consideration shall be given to reconversion problems, or to whether profits remaining after the payment of federal taxes will be excessive.

Allowable Deductions

One of the most important provisions of the new act has to do with the allowable deductions in determining profits. The 1942 law required Price Adjustment Boards to recognize the exclusions and deductions "of the character" allowed under the Internal Revenue Code, but otherwise it contained no directions concerning cost determination. The Boards construed this to mean that they were not required to allow deductions in the same amount in renegotiation as were allowed as tax deductions, and, therefore, any cost which the boards felt was too high or was unreasonable, was allowed only to the extent they regarded such cost as reasonable, even though the entire cost was a proper deduction for tax purposes.

The 1943 Revenue Law changes this, and requires that all items "estimated to be allowable as deductions and exclusions" under the Internal Revenue Code (excluding taxes measured by income) shall be allowed as items of cost. This means that all the deductions which may be taken under the tax sections of the Internal Revenue Code will be recognized in renegotiation as deductible costs and will be allowed as estimated. No doubt the term "estimated" was used inasmuch as the renegotiation agencies will be required to make their determinations prior to the time that the Bureau of Internal Revenue makes its determination. However, no federal or state taxes based upon income may be deducted, but proper adjustment is made for state taxes which are attributable to the portion of the profits which are not excessive. Suppose, for example, a contractor has profits of $200,000, of which $20,000 are held to be excessive. Assume the contractor paid a state income tax of $10,000, and that it is determined that $9,000 of this tax was attributable to the $180,000 profit. The contractor would refund $20,000 less $9,000, or $11,000.

Recomputation of Amortization Deduction

Another important provision in the new act is that allowing the recomputation of the amortization deduction in the event facilities become unnecessary, thus accelerating the amortization period. In other words, the contractor is entitled to a refund of excessive profits where the five-year amortization period is shortened to allow a faster tax write-off on facilities no longer needed for war purposes and the excessive profits eliminated for a prior year may be refunded to the extent that a recomputation of the amortization under Section 124(d) of the Internal Revenue Code for such year exceeds the deduction allowed in renegotiation for that year.

Exemptions

The original law contained two mandatory exemptions, which are continued in the new law. They are:

(1) Any contract by a department with any other department, bureau, agency or government corporation of the United States or with any territory, state or foreign government or agency thereof is exempt from renegotiation.

(2) Any contract or subcontract for the product of a mine, oil or gas well, or other natural deposit or timber which has not been processed, refined or treated beyond the first form or state suitable for industrial use, is exempt.

Four new mandatory exemptions have been added. They are:

(1) Contracts for an agricultural commodity in its raw or natural state. Retroactive to April 28, 1942.

(2) Any contract or subcontract with a tax exempt corporation as defined in Section 101(6) of Internal Revenue Code. This exemption retroactive to April 28, 1942.

(3) Any contract with a department awarded as a result of competitive bidding, for the construction of any building, structure, improvement or facility, is exempt. This is not retroactive and applies only to fiscal years ending after June 30, 1943.

(4) Any subcontractor, directly or indirectly under a contractor or subcontractor to which the renegotiation law is not applicable because such contractor or subcontractor is entitled to a mandatory exemption, is exempt from renegotiation. This exemption is retroactive to April 28, 1942.

Under the 1942 law, the Secretary could, in his discretion, exempt the following contracts and subcontracts:

(1) Any contract or subcontract to be performed outside the territorial limits of the United States or in Alaska.

(2) Any contract or subcontract under which, in the Secretary's opinion, the profits can be determined with reasonable certainty when the contract price is established, such as agreements for personal services, for the purchase of real property, perishable goods, or commodities the minimum sales price of which has been fixed by a public regulatory body, of leases and license agreements, and of agreements where the period of performance under the contract will not be in excess of thirty days.

(3) When the contract provisions are adequate to prevent excessive prices he may exempt all or any portion of the contract from renegotiation or provide that the price in effect during any period shall not be subject to renegotiation.

The following discretionary exemptions are all retained in the

1943 act, and new ones have been added. The board may exempt:

(1) Any contract or subcontract, if, in its opinion, competitive conditions affecting the making of such contract or subcontract are such as are likely to result in effective competition with respect to the contract price.

(2) Any subcontract or group of subcontracts not otherwise exempt from the act, if in the board's opinion, it is not administratively feasible in those cases to determine and segregate the profits attributable to such contract or group from the profits on business not subject to the act.

(3) The most important discretionary exemption created by the new act is with regard to standard commercial articles. The statute provides that the board may exempt any contract or subcontract for the making or furnishing of a standard commercial article if the board thinks competitive conditions affecting the sale of the article are such as will reasonably protect the government against excessive prices. This applies to years ending after June 30, 1943. The term "standard commercial article" means an article:

> "(a) which is identical in every material respect with an article which was manufactured and sold, and in general civilian, industrial, or commercial use prior to January 1, 1940,
>
> "(b) which is identical in every material respect with an article which is manufactured and sold, as a competitive product, by more than one manufacturer, or which is an article of the same kind and having the same use or uses as an article manufactured and sold, as a competitive product, by more than one manufacturer, and
>
> "(c) for which a maximum price has been established and is in effect under the Emergency Price Control Act of 1942, as amended, or under the Act of October 2, 1942, entitled 'An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes,' or which is sold at a price not in excess of the January 1, 1941, selling price.
>
> "An article made in whole or in part of substitute materials but otherwise identical in every material respect with the article with which it is compared under subparagraph (a) and (b) shall be considered as identical in every material respect with such article with which it is so compared."

The 1942 law exempted from renegotiation a contractor whose aggregate sales were less than $100,000. The 1943 law raises this minimum to $500,000. The statute provides that in

order to qualify for this exemption the aggregate sales of the contractor and all persons "under the control of or controlling or under common control" with the contractor do not exceed $500,000. In determining whether the contractor controls or is controlled by or under common control with another, the Price Adjustment Board has adopted the following principles:

(1) A corporation which owns more than 50% of the voting stock of another corporation controls that other corporation and also controls all corporations controlled by it.

(2) A person who owns more than 50% of the voting stock of a corporation controls that corporation.

(3) A general partner who is entitled to more than 50% of the profits of a partnership controls the partnership.

(4) A joint venturer who is entitled to more than 50% of the profits of a joint venture controls the joint venture.

However, the regulations provide that actual control is a question of fact and that whenever it is believed that actual control exists, even though the foregoing conditions are not fulfilled, the matter may be determined by the department conducting the renegotiation.

War Contracts Price Adjustment Board

The new law creates the War Contracts Price Adjustment Board, composed of six members—one from each of the departments and the War Production Board. This board is now charged with the full responsibility for the administration of the renegotiation statute. It may delegate authority to the Secretary of a department, who, in turn, may redelegate authority, with the result that the original administrative setup has not been changed. One of its principal functions, of course, will be reviewing of individual renegotiation cases. The board may review a renegotiation determination either on its own motion or in its discretion at the request of any contractor. Unless the board undertakes such a review on its own motion within sixty days from the date of the original decision, or does so at the request of the contractor affected, the determination of the original renegotiating agency shall be the determination of the board. If, as the result of conferences with the renegotiating sections, a final agreement cannot be reached, the board is authorized to issue a unilateral order determining the amount of

excessive profits. Notice must be given the contractor by registered mail, and unless a petition for review is filed with the Tax Court of the United States, this order is final and conclusive and may not be reviewed or redetermined by any other court or agency.

One important change in existing procedure is the requirement that the Price Adjustment Boards, at the request of a contractor, must furnish a statement of the excessive profits determination, including the facts upon which it is based, and the board's reason for the determination.

In order to obtain a review by the War Contracts Price Adjustment Board, contractors must make a request within sixty days from the date of the original determination. If the board fails to initiate the review within sixty days after the request, then, for the purpose of court review, the original determination automatically becomes the determination of the board. If the contractor makes no request and the board does not initiate a review on its own motion, the original determination of the agency becomes the board's determination sixty days after its rendition. Upon review, the board may determine the amount to be less than, equal to, or greater than the amount of the initial determination.

Any agreement reached as to excessive profits is final and conclusive and may not be reopened except upon a showing of fraud, malfeasance or a wilful misrepresentation of a material fact, and it may not be modified by any government officer, employee or agent, nor set aside in any suit or court proceeding.

The War Contracts Price Adjustment Board has promulgated extensive regulations interpreting the statute. They have been published in the Federal Register, January 26, 1945, 10 Fed. Reg., 963, and on February 20, 1945, 10 Fed. Reg., 2026. These regulations may be obtained from the Superintendent of Documents, Washington, D. C., and will also be found in the loose leaf War Law Service.

Contractor's Statement

Every contractor subject to the act is now required to file a financial statement on a form which has been prescribed by the board. Such statement must be filed on or before the first day of the fourth month following the close of the contractor's

fiscal year, but if the fiscal year has closed on the date of the enactment of the Revenue Act of 1943 (February 25, 1944) then on or before the first day of the fourth month following the month in which the Revenue Act of 1943 was enacted. Other information may be required by the board, but it must confine itself to information which is necessary to carry out the renegotiation act. The wilful failure or refusal to furnish the financial statement required, or the furnishing of any data which is false or misleading makes a contractor liable to criminal penalties.

Redetermination by the Tax Court

Perhaps the most important provision of the new act, protecting contractors against any arbitrary determination by the board, is the provision permitting an appeal from a determination of a renegotiating agency either to the full board within sixty days, or to the Tax Court of the United States within ninety days from the date of the final determination. When an appeal is filed with the Tax Court the board is precluded from further action because the Tax Court then has exclusive jurisdiction to determine the amount, if any, of excessive profits realized by the contractor. The contractor, however, may appeal only from a unilateral determination by a Secretary of one of the departments or of the board. He may not appeal from any settlement to which he has agreed. Any contractor or subcontractor, except a contractor for fees or commissions, dissatisfied with the unilateral determination made prior to the time of the enactment of the Revenue Act of 1943, with respect to a fiscal year ending before July 1, 1943, may within ninety days after the enactment of the Revenue Act of 1943 file a petition in the Tax Court for review, but if a unilateral determination with regard to the same fiscal period is made after enactment of the Revenue Act of 1943, then appeal can be taken to the Tax Court within ninety days from the date of such enactment. Any amendments to the renegotiation law which are not applicable as of April 28, 1942, or to fiscal years ending before July 1, 1943, shall not apply on the consideration of such appeals. The hearing before the Tax Court is a hearing *de novo*. The statement of the board's determination cannot be used in the Tax Court as proof of the facts or conclusions stated therein. It can, however, be offered as evidence of the findings of the board

from which appeal is taken. The determination by the Tax Court cannot be reviewed by any government agency or appealed to a higher court.

One unfortunate omission in the statute, from the contractor's point of view, is that an appeal to the Tax Court does not stay any proceedings by the board to eliminate excessive profits, under Section 403(c)(2) of the Statute.

Statute of Limitations

The 1943 Act makes more certain the Statute of Limitations period. It provides that if renegotiation is not commenced within one year after the close of the contractor's fiscal year, or within one year of the filing with the board of the required financial data, whichever is the later, the contractor will be free from all liability for excessive profits during such fiscal year; or if the agreement or order determining the amount of excessive profits is not made within one year after the commencement of renegotiation, then all liability of the contractor for excessive profits with respect to which such renegotiation was commenced shall be discharged.

Forward Pricing

A new provision in the 1943 act has to do with the forward pricing of war contracts. The 1942 renegotiation act required a contractor to renegotiate the contract price of any contract where the profits realized were excessive, and where an agreement was reached as to the amount of such excessive profits, the agreement usually contained a clause whereby the contractor agreed to reduce his future prices so as to eliminate excessive profits in the future. However, the Price Adjustment Board had no power to issue a unilateral order adjusting the prices downward on future deliveries, and excessive profits on such future deliveries were recovered by subsequent renegotiation.

The new act contains a new provision for repricing. The Secretary of a department may require a contractor "to negotiate to fix a fair and reasonable price" for any article, the price of which the Secretary regards to be "unreasonable and unfair." If the contractor does not agree to the price which the Secretary fixes as fair, the Secretary can issue an order fixing the price. If the contractor refuses to furnish the article at the price fixed, the Secretary may take over the contractor's

plant and operate it in accordance with section 9 of the Selective Service Act of 1940.

If a contractor believes that the price fixed by the Secretary is unreasonable, he may sue the United States in any proper court, but the filing of the suit does not stay the effect of the order. In this suit he may recover the difference between the reasonable value of the articles furnished and the price fixed for such articles in the order. On the other hand, if the price fixed in the order is found by the court to be in excess of fair and reasonable compensation, the contractor is liable to the United States for the amount of such excess. The contractor, in renegotiation, is limited to the Tax Court; in cases involving repricing of contracts he can bring action in the District Courts or the Court of Claims.

The suit must be brought within six months of the date of the order, or after the expiration of the period specified in the order, whichever occurs last. The effect of the provision is to separate repricing from renegotiation, and puts the matter of forward pricing in the hands of the procurement officers. However, they will no doubt secure from the renegotiation agencies the information they have obtained as to contract prices and excessive profits.

The repricing sections differ from the renegotiation sections. They apply to the same departments of government but there are no exemptions. The fact that a contractor's sales are less than $500,000 is immaterial. Any government contract is subject to repricing regardless of amount, type or product to be supplied. The unilateral order can affect only future business.

Relation of Termination and Renegotiation

Attention is called to the fact that termination and renegotiation are related to the extent necessary to protect the government against an overpayment, resulting from a duplication of cost allowances. Termination settlements are subject to future renegotiation and costs which are used and allowed to reduce or avoid a renegotiation refund will not be allowed in termination. If a renegotiation refund is made for a prior period, the full amount of all costs allowed in that renegotiation will be disallowed on a subsequent termination. If no renegotiation refund was made a cost will be disallowed in termination only to the extent to which an allowance of that cost avoided a renegotia-

tion refund. If profits for a fiscal year, excluding costs which are allocable to a terminated contract, are not excessive then no duplication of costs occurs. The only contractors who can disregard this relationship are those whose volume of business is so small that they are not subject to the renegotiation act.

Conclusion

In conclusion, it may be said that the Price Adjustment Boards have done a commendable job in the administration of the act. For the most part, the work has been carried on by a competent and conscientious group of men. On the other hand, the determination of excessive profits by these boards is an arbitrary proceeding. The statute enumerates certain factors to be considered in determining excessive profits but does not dictate how they shall be determined. The boards have classified industries and determined an arbitrary percentage of profit which, in their opinion, shall be allowed these respective classifications, and that percentage is closely adhered to and little variation therefrom is made. In many cases this results in a refund based upon an unreal percentage in preference to a fair dollar refund, which would be arrived at as a result of a negotiation between two parties.

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